No. 82-1185

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD E. MUIR, JEFF BUTTRAM, and O. NAVARRO FAIRCLOTH,

Petitioners,

v.

ALABAMA EDUCATIONAL TELEVISION COMMISSION; JACOB WALKER, JERRI MCLAIN, BERTHA S. ROBERTS, THOMAS T. MARTIN, HELEN SHORES LEE, individually and in their capacities as members of the ALABAMA EDUCATIONAL TELEVISION COMMISSION; EDWARD WEGENER, individually and as General Manager of the COMMISSION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Did the Alabama Educational Television Commission's programming decision made out of concern for the safety of Alabamians abroad violate the public's First Amendment rights?

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RESTATEMENT OF THE CASE

(a) Statement of Facts

Respondent Alabama Educational Television Commission ("AETC") is a broadcast licensee of the Federal Communications Commission operating a statewide educational television network in the State of Alabama.[1]

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[1] AETC was created by legislative act in 1953. Under § 16-7-1-5 of the *Code of Alabama* (1975), AETC is charged with the duty of "controlling and supervising the use of channels reserved by the Federal Communications Commission to Alabama for non-

Composed of a body of citizens appointed by the Governor and approved by the legislature, AETC receives its funding from three sources: the State legislature, grants from the Corporation for Public Broadcasting, and private contributions.[2]

This case arises from an individual programming decision by AETC, as licensee, not to broadcast the film "Death of a Princess" on May 12, 1980. The program had been scheduled for nationwide distribution on the evening of May 12 by the Public Broadcasting Service as one of thirteen segments of the series "World" to its public television licensees, including AETC. As one of 144 public television licensees funding the production of "World" through the Station Programming Cooperative, a funding mechanism of PBS, AETC had the contractual right to broadcast all of the programs making up the series and to decide to reject any of the films it did not wish to broadcast.[3] AETC's Station Users Agreement with PBS also affords AETC the absolute right to reject any program offered to it by PBS.[4]

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commercial educational use." AETC owns a network of nine stations which normally operate as a unitary network broadcasting the same program. AETC is the licensee for the entire network.

[2] The members of AETC who decided not to air "Death of a Princess" and their respective professions or occupations are: Jacob Walker, attorney; Bertha Roberts, housewife; Helen Shores Lee, mental health worker; Jerri McLain, public relations officer for a hospital; Thomas T. Martin, a retired employee of a railroad company (deposition of Edward Wegener, pp. 49-50).

[3] The rights of AETC and other licensee affiliates to broadcast "Death of a Princess" extended for three years following the initial broadcast and expire in May, 1983.

[4] This licensee discretion over programming is required by Section 73.658(e) of the Federal Communications Commission Rules, which prohibit the granting of a license to any station which has entered contracts respecting programming that prevent the broadcaster from (1) "rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable

The program "Death of a Princess" is a dramatization of the events leading up to the execution in July, 1979 of a Saudi Arabian princess and her lover. Both the series "World" and its segment "Death of a Princess" were scheduled for broadcast by AETC several months prior to May 12, 1980, before AETC had had an opportunity to preview the segment.

The undisputed evidence, as found by the District Court and unchallenged on appeal, was that during the week preceding the scheduled broadcast on May 12, 1980 AETC received numerous communications from Alabama residents in different areas of the State vigorously protesting broadcast of the program. App. 214-215. Many of the protests were based on fears that airing the program could threaten the safety and well-being of Alabama citizens residing in the Middle East. Because of these protests, the five members of AETC met through telephone conference call on May 9, 1980 and unanimously decided not to broadcast the program on May 12, 1980. App. 215. As found by the District Court, the reason for AETC's decision not to broadcast "Death of a Princess" was its concern that "a showing of the film could expose Alabama citizens in the Middle East to physical and emotional abuse through rioting, physical assault and property damage." App. 215.

(b) Course of Proceedings

Following the decision not to broadcast the program, petitioners filed an action on May 12, 1980 seeking a temporary restraining order to compel the film's showing that night, as well as preliminary and permanent injunctive relief. The District Court denied the temporary restraining order and scheduled oral argument on petitioners' Motion for Preliminary Injunction. The court ordered

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or contrary to the public interest or (2) substituting a program which, in the station's opinion, is of greater local or national importance."

that affidavits and evidence adduced during discovery be submitted on the preliminary injunction motion prior to oral argument. Both parties agreed to this procedure. Prior to oral argument, respondents filed a Motion for Summary Judgment on grounds that there were no material facts in dispute and that AETC's decision, as a matter of law, had not violated petitioners' First Amendment rights. Petitioners filed no response to the Motion for Summary Judgment. At the hearing conducted by Judge Guin on both Motions, petitioners made no argument that there were material facts in dispute concerning AETC's motives for its programming decision or other factual matters at issue which would preclude the granting of Summary Judgment.

Following the hearing, the District Court entered a Memorandum Opinion and Order granting AETC's Motion for Summary Judgment. In his opinion, Judge Guin held that AETC's decision, made on the basis of public interest concerns, was a legitimate exercise of its statutory authority as a broadcast licensee to make programming decisions. The court further found that petitioners had no First Amendment rights to compel AETC to broadcast a film and that such "prior compulsion" would violate AETC's First Amendment rights.

On appeal, a panel of the Fifth Circuit Court of Appeals affirmed Judge Guin's decision by a 2 to 1 vote. Petitioners' request for rehearing *en banc* was granted, and the case was consolidated for the rehearing with *Barnstone* v. *University of Houston*.[5] The court again affirmed the decision of the District Court with 15 of the 22 judges concurring. The opinion of the court, written by Judge Hill and joined in by ten other judges, held that AETC's programming decision was a valid act of editorial control over its medium of expression, statutorily granted to all licensed broadcasters, and not an act of government cen-

[5] Amicus briefs urging affirmance were presented to the Court of Appeals by the FCC, PBS and CBS.

sorship. The court further held that AETC was not a public forum, and petitioners had no First Amendment rights to see the film or to compel its broadcast. In two separate concurring opinions, Judge Rubin, joined by three other judges, and Judge Garwood emphasized that a publicly-supported licensee which dedicates its facilities to the dissemination of a wide variety of educational, entertainment and public affairs programs has exclusive control over its editorial functions and that these functions exclude a right of access to members of the viewing public to compel the showing of a desired film. Seven judges dissented.

ARGUMENT

There are at least three reasons why this Court should not grant certiorari in this case. First, the record does not present the question posed, or the argument made, by petitioners. Second, there is no likelihood that the Court would uphold petitioners' position, particularly when the balancing standards which they urge upon the Court would be totally unworkable in practice and would impose intolerable burdens on the judiciary and on public broadcast licensees. Finally, the issues involved are not likely to reoccur on anything approaching a regular basis in the format presented by this case.

1. This Is Not A Case Involving a "Political" Decision

The Question Presented by petitioners assumes that "Death of a Princess" was cancelled because the program's subject matter was "controversial" (Pet. i), and the entire argument that follows is premised upon the assumption that the decision to cancel was "political",[6] although "political" is nowhere defined or explained.

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[6] Petitioners contend, for example, that this case involves "politically motivated programming decisions" (Pet. 14), "one political idea over another" (Pet. 14-15), "overtly political criteria" (Pet. 15, 19), "political views" (Pet. 17), "propaganda arms of the political

That is not this case. The District Court found only one reason why "Death of a Princess" was cancelled: its showing, the licensee thought, would have "exposed Alabama citizens in the Middle East to physical and emotional abuse through rioting, physical assault and property damage." App. 215; *see also* App. 222.[7] This finding was fully supported by the record, which showed numerous communications from Alabama residents expressing fear for the personal safety and well-being of Alabama citizens working in the Middle East. *See* App. 9.[8] The District Court's finding was not overruled or otherwise disturbed by the Court of Appeals, nor could it have been on this record.

If this Court heard this case, therefore, it would first have to decide why "Death of a Princess" was cancelled, and it would be met at the threshold by the two-court

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majority" (Pet. 17), "political pressure" (Pet. 17 n.10), "political content" (Pet. 18 (twice), 23, 24), a "political instrument" (Pet. 18), "political censorship" (Pet. 18, 19, 20, 21), "Political interference" (Pet. 20), "politically motivated attempts" (Pet. 21), "political grounds" (Pet. 22), "political favoritism" (Pet. 22), and "political impact" (Pet. 26).

[7] The record is bereft of any evidence of reasons that might be labeled "political" in the conventional sense. For example, there is no evidence that the Governor of Alabama or members of the legislature interfered with AETC's decision-making authority or that AETC cancelled the program to serve the views of a particular political candidate or party or to exclude from the viewers one side of an issue in favor of another.

[8] With great respect, we suggest that Judge Johnson in dissent puts the reason for the cancellation on its head. He writes that the program was cancelled because it presented "a point of view disagreeable to the religious and political regime of a foreign country." App. 87. This is like saying that the sailing dates for troopships in time of war cannot be published because the enemy would enjoy having the information. *Cf. Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). The real reason is that such a publication would present an imminent threat to the lives of Americans, which is analogous to the danger which AETC feared was posed to the lives of Alabamians in this case.

rule.[9] This is not, after all, a case in which the Governor or State legislature, with little relationship to AETC, attempted to work their will on programming, nor is it a case in which the AETC tried to prevent anyone else from broadcasting the program. According to the undisputed findings of the District Court, AETC is vested under Alabama law with the duty to control and supervise the operations of its own stations (App. 212-213), it is responsible under its federal broadcasting license for selecting the programs to be aired (App. 213),[10] and as a PBS member it retains the absolute right to decide which PBS programs will be shown. App. 214-215.[11] The AETC, in turn, consists of its commissioners, who made the decision not to broadcast "Death of a Princess." App. 215.[12]

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[9] This Court will not disturb the concurrent findings of two lower courts "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949), *aff'd on rehearing*, 339 U.S. 605 (1950). No such showing has even been attempted here.

[10] " 'The Commission has always regarded the maintenance of control over programming as a most fundamental obligation of the licensee.' " *Cosmopolitan Broadcasting Corp.* v. *FCC*, 581 F.2d 917, 921 (D.C. Cir. 1978), quoting *WCHS-AM-TV Corp.*, 8 F.C.C.2d 608, 609 (1967). Failure by the licensee to retain control over its programming can result in license revocation. *University of Pennsylvania*, 69 F.C.C.2d 1394 (1978).

[11] As a matter of fact, the FCC provides, in regulations having the force of law, that no licensee may have a contract with a network preventing the station from "rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable or contrary to the public interest * * *". Section 73.658(e), 47 C.F.R. § 73.658(e).

[12] There can be no question that this type of editorial decision made independently by the licensee for public interest reasons has long been required of the broadcaster as an essential part of its statutory duties under the 1934 Communications Act. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103-113, 121-125 (1973); *Mississippi Auth. Educ. Television*, 71 F.C.C.2d 1296 (1979); *En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960); *Representative Patsy Mink*, 59 F.C.C. 2d 987 (1976).

Thus, the broadcasting decision under attack in this case was not "political" under any reasonable definition of that term,[13] and the scenarios presented by the Petition and the dissenters below are hypothetical in relation to this record. The Court is being asked, in effect, to render an advisory opinion. The single question here—which is not the one posed by the Petition—is whether a state-operated television station, acting through its properly designated officials, can cancel a broadcast because of dangers to the State's citizens without violating the First Amendment rights of the station's audience.[14]

What petitioners ignore is that AETC is responsible for what is broadcast over its stations and can be sued, or can lose its license, as a consequence of improper editorial decisions.[15] AETC must constantly exercise its discretion, and it must do so through numerous editorial judgments every day of the year. If it allows a defamatory or obscene program to be aired, for example, the consequences can be swift, sure and terrible. Persons who are harmed could recover damages, the FCC could revoke its license, or the State legislature could cut off its funds or put it out of business.[16] That is what editing is all about in the

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[13] Of course, if petitioners mean "political" in its most simplistic sense—"of or relating to government"—we readily concede that the decision here was "political" in the sense that it was made by a licensee created by the Alabama legislature. But if used in that sense, *every* decision made by AETC has been and would be "political".

[14] Even petitioners appear to concede that program ideas can be barred if they create "imminent public danger." Pet. 24-25.

[15] *E.g.*, *Herbert* v. *Lando*, 441 U.S. 153 (1979); *Street* v. *National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. dismissed*, 454 U.S. 1095 (1981); *Developments in the Law-Defamation*, 69 Harv. L. Rev. 875, 907 (1956).

[16] AETC is thus readily distinguishable from a State-operated library, and this case is not the same as *Board of Education* v. *Pico*, 454 U.S. 891 (1982). A librarian is not responsible for what is

broadcast business. Yet petitioners propose that courts invade that province and dictate editorial decisions.

2. The Standards Espoused by Petitioners Are Wholly Unworkable

We need look no further than the Petition to demonstrate how totally unworkable, and how destructive of the federal system, it would be if this Court were to sanction the judicial intervention into broadcasting espoused by petitioners.

Petitioners undoubtedly have given serious and prolonged consideration to a formulation of the standards that they believe should govern the judicial role in cases such as this one.[17] Yet they now contend that when television programs are rejected, the following steps necessarily ensue:

(a) First, complaints could be brought, and the courts would have to entertain them, whether a particular program was simply refused outright or whether it was initially accepted and then cancelled.[18] Thus, every time *any* station deemed to be "state operated," anywhere in the country, declined for *any* reason to broadcast *any* program which was submitted to it, regardless of source and regardless of content, the courts would have to entertain *any* complaint filed by *any* member of the station's audience.

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written in the books on his shelves. He cannot be sued or lose his library license if those words turn out to violate someone's rights. This very point was made in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 741 n.16 (1978), where the Court noted several critical distinctions between what is printed and what is broadcast.

[17] The cancellation of "Death of a Princess" occurred over 2½ years ago. App. 214.

[18] Petitioners say that while initial selection cases "will be harder to prove," the same standard applies to both types of decisions. Pet. 23 n.12.

(b) The next step would be for a member of the public to "show that the program's political content was a substantial or motivating factor in the decision not to broadcast." Pet. 23. A number of questions immediately arise.

(i) How does the plaintiff demonstrate the reason for the decision not to broadcast? Unless the station admits its culpability at the outset in answers to interrogatories or requests for admissions—an unlikely event—its editorial staff presumably must be deposed. Thus, through the simple device of alleging that a decision not to broadcast was in part politically motivated, the plaintiff would be able to take the deposition of every one at the station involved in the decision-making process. The case, even at this early stage, would take on the aspects of a libel action, even though a libel defendant is able to test whether the charges make out a case of prima facie defamation before having to submit to discovery.[19] Regardless of the ultimate outcome, the cost in terms of time, money, and a disruption of the broadcasting process could be enormous.[20] Thus, the licensee would necessary be con-

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[19] *Cf. Herbert* v. *Lando, supra,* and its progeny.

[20] *See Delta Air Lines, Inc.* v. *August,* 450 U.S. 346, 363-364 n.1 (1981) (Powell, J., concurring).

The proceedings in the companion case of *Barnstone* v. *University of Houston* graphically illustrate this point. In *Barnstone,* suit was filed on May 8, 1980 challenging the University of Houston's decision not to broadcast "Death of a Princess" four days later, on May 12, 1980 at 8:00 p.m. The plaintiffs sought a temporary restraining order to compel the broadcast as scheduled for May 12, a permanent injunction and damages. On May 9 the District Court held a full hearing on the motion for a temporary restraining order in which the station's director of programming, University officials and other witnesses testified concerning the motivations for the programming decisions. The District Court granted a temporary restraining order on May 9, ordering that the program be shown on May 12 at its previously scheduled time. On May 12 the University of Houston filed an emergency appeal to the Fifth Circuit Court of Appeals, asking for suspension of the temporary restraining order. A panel of the Fifth Circuit vacated the temporary restraining order on

fronted at the outset of each case with a Hobson's choice: either incur the financial and administrative costs of such litigation at a time when public broadcasting is starving for funds, or abdicate responsibility and broadcast a program which the licensee believes will be contrary to the public interest.

(ii) What is "political content"? For some, George Carlin's album on the seven dirtiest words is pure entertainment, and for others it is a political statement. For some, "All In the Family" is as much political as it is amusing. A violent movie about the Vietnam War may be only a movie or it may be politically provocative, depending upon the eye of the beholder. "Political content" thus has either no meaning or unlimited meaning. Yet petitioners would have the courts involve themselves in whatever is alleged to have "political content."

(iii) How would the courts ever judge whether a particular factor was "substantial or motivating"? In all likelihood, the licensee itself could not say in many instances. For example, in the Houston case, six separate

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condition that a tape of the film be preserved. Prior to 8:00 p.m. on May 12 the plaintiffs filed a motion with this Court to stay the Fifth Circuit's order. Justice Powell denied the motion.

Thereafter, the parties each filed motions for summary judgment and voluminous memoranda of law in support of their motions. Following a hearing on the motions, the District Court decided that material facts were in dispute and denied the motions. The case was tried on August 21, 1980 and consumed almost three days, much of it devoted to the reasons for the cancellation and the chain of authority over programming at the University of Houston. Staff members of the station, the President of the University and other officials were called as witnesses to explain the University's action. Following the trial, almost three months passed before the court entered its order on December 18, 1982 finding that the station's programming decision was impermissible under the First Amendment. The District Court ordered the program shown within thirty days. Since that order, over two years of appeals have been devoted to examining the constitutional legitimacy of this single program decision.

reasons were found by the District Court to have caused the cancellation. *See* App. 11-12 and n.5. Which reason or reasons were substantial, which unsubstantial, which motivating, which merely contributory? Suppose the decision is by a group, and each member of the group has a different reason?

(c) Once the plaintiff has met his initial burden, the court would then have to "balance the competing constitutional interests of the parties". Pet. 23-24. We are not told which of these competing interests predominates or why. However, the factors to be balanced "include" the public's right to see and hear the program[21] and the broadcaster's right to choose its own schedule. Pet. 24. The other factors to be considered are not given. According to petitioners, "Only a desire to present a balanced presentation of all sides of an issue" tips the balance in favor of exclusion. *Id.* The trier of fact must now determine, in addition to the other matters previously discussed, whether the broadcaster had a desire (wish? hope?) to balance his presentation. Does this mean, for example, that if he views the program as one-sided, he may not reject it for that reason but must instead pur-

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[21] We have assumed throughout this discussion, for purposes of argument, that the public has a judicially enforceable constitutional right to a particular program. This Court, however, has never established any such right, and for good reason. Such a right would have far-reaching implications even beyond broadcasting. For example, if the Secretary of Agriculture in the State of Kansas were to publish a magazine or newsletter for farmers, and he rejected a particular article dealing with agricultural legislation, he could be sued by almost any Kansan for censoring "political content". Thus, although petitioners disclaim any intent to establish a "right of access" on behalf of the viewing public, the fact is that there is no discernible practical or legal difference between what they seek and a right of access. We strongly believe that the court below was correct in holding that the public does not have a First Amendment right which was violated in this case. We emphasize, however, that for the reasons outlined in the text above, the Court need not reach the right-of-access question in order to determine that certiorari should be denied in this case.

chase or produce another program to provide the requisite balance? [22]

(d) Finally, after the court has successfully threaded its way through this bewildering array of choices, the burden would shift to the broadcaster to show that it would have made the same decision even if it had applied "politically non-discriminatory rules of programming." Pet. 25. Apparently this is to be accomplished by demonstrating that the broadcaster's "normal programming practice or policy" would have resulted in the same decision. Pet. 25-26. How "normal programming" is to be compared with a single program such as "Death of a Princess" is not explained.[23] However, the court would have to consider such factors as "technical quality, format, style, *and the like.*" Pet. 26 (emphasis added).

At this point in petitioner's discussion, there is no longer any doubt that the courts are being asked to take over the editorial process normally considered the prerogative of broadcasters. We must ask how this Court could possibly approve a judge looking into such matters as the quality or style of a program to determine whether that program *must* be shown on television. Editorial deci-

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[22] According to petitioners, if a program is false, defamatory or obscene, or if it would create imminent public danger, the broadcaster prevails. Pet. 24. We note some inconsistency here, however, since in other contexts, a State normally cannot "censor" merely because it regards material as false. Moreover, when the issue is whether a temporary restraining order should be issued, who has the burden of showing whether the material is false, defamatory or unbalanced, the plaintiff or the defendant? If the program in question, like "Death of a Princess," was produced not by the licensee but rather by an independent producer, can the program's producer be forced to testify about his editorial decisions when the issues of truth or balance are litigated?

[23] The dissent would ignore a broadcaster's policy or normal practice and focus instead upon the individual decision as to each and every program. App. 113-114. This would result in even more of an intrusion into broadcasting by the courts than that proposed by petitioners.

sions by broadcasters are not the result of mechanical application of objective and measurable standards, like rules of mathematics. Such decisions result from the exercise of human judgment as to what will or will not serve the public interest. If the standards proposed by petitioners were adopted by this Court, the judiciary would be mired in a quagmire from which it would have difficulty extricating itself.

This Court need not and should not reach that result. The court below (App. 18 n.13) was properly sensitive to this Court's guidance in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*, 412 U.S. at 102, that

> [b]alancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned.

The AETC's programming decision was consistent with its responsibilities under that regulatory scheme[24] and did no injustice to that delicate balance of First Amendment interests. Judicial intervention under the facts presented by this case is unwarranted and would not serve the public interest.

3. The Case Is Not Cert-Worthy

This case is worthy of review only if it presents an issue that is of national importance and is likely to recur. Supreme Court Rule 19; R. Stern & E. Gressman, *Supreme Court Practice*, 254-338 (BNA 5th ed. 1978), and cases there cited. Yet, despite the long and litigious history of the broadcasting industry, petitioners can point to no con-

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[24] *See* note 12, *supra*.

flict among the circuits over the questions presented. The reason is simple: No one has heretofore seriously contended that broadcasting decisions of this kind should be judicially reviewed. We readily concede that if the question is simply whether the courts are to intervene whenever some viewer challenges a programming decision, there is bound to be reoccurrence in the future. But if the issue is tailored to the type of broadcasting decision that was made in this case, we submit that it is unlikely to recur on a regular basis, if at all. The circumstances are unique. And cases of this kind cannot be decided without relation to their surrounding circumstances—unless, of course, the Court were to adopt petitioners' all-inclusive view of judicial intervention. And we have shown that such a view simply will not stand analysis.[25]

We respectfully suggest that certiorari should not be granted unless this Court is prepared to sanction the kind of order that was entered by the Federal District Court in the Houston case: "KUHT-TV is hereby ORDERED to air 'Death of a Princess' in its entirety within thirty (30) days of the date of this Order at a time comparable to that which was originally scheduled." 514 F. Supp. at 692. As onerous as a prior restraint is,[26] surely ordering a station to place an unwanted program on the air is just as unthinkable.[27]

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[25] Judge Johnson in dissent argued that the FCC cannot be depended upon to remedy any wrong in programming because it is prohibited by the First Amendment from either censoring material or directing its inclusion in programs. App. 103. What he fails to explain is how the courts can order what the Constitution prevents the FCC from directing.

[26] *E.g.*, *Near* v. *Minnesota ex rel. Olson*, *supra*; *New York Times* v. *United States*, 403 U.S. 713 (1971); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976).

[27] See generally *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974).

We believe that the decisions by the broadcasters in this case and in the Houston case were the correct ones. But even if they were not, a refusal by the Court to hear these two cases would not mean that broadcasters, with impunity, can engage in arbitrary and capricious decisions against the public interest. Public broadcasters do not operate without constraint. They are strictly regulated by the Federal Communications Commission. More importantly, a State educational television authority, such as AETC, is directly accountable to the people of its State. If the broadcaster fails to carry out its public obligations, the citizens will ultimately respond by either eliminating its funding by the State legislature or even abolishing the network itself. For these reasons alone, the straitjacket advocated by petitioners is neither necessary nor appropiate.

CONCLUSION

For each of the reasons outlined above, certiorari should be denied.

Respectfully submitted,

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